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No. 03-1408

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NANCY BURTON,

Petitioner,

—v.—

HONORABLE A. WILLIAM MOTTOLESE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF CONNECTICUT

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The Petitioner is a public-interest attorney known in Connecticut for representing unpopular causes successfully.[1] She has never been the subject of a grievance complaint by a client. The Petitioner "maintains a good reputation as an attorney in the community."[2]

The Petitioner has mounted challenges to questionable judicial conduct, including that of the Respondent, Hon. A William Mottolese.[3] In this petition, she challenges

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[1] See, e.g., *State v. Mourning*, 247 Conn. 634, 723 A.2d 316 (1999) (" . . . it is necessary that the defendant's incarceration be terminated immediately . . .")(Petitioner representing defendant); *Fish Unlimited v. Northeast Utilities*,1999 Conn. Super. LEXIS 1180 (1999)(temporary restraining order granted, blocking the restart of the Millstone Unit 2 nuclear reactor in Waterford, Connecticut, on environmental grounds)(Petitioner representing plaintiff); *In re Northeast Utilities*, Docket No. 50-423-LA-3 (exposure by Intervenor during proceedings of the U.S. Atomic Safety and Licensing Board of the loss of two highly radioactive spent fuel rods from the Millstone Unit 1 spent fuel pool, leading to a penalty of $288,000 assessed against Northeast Utilities by the U.S. Nuclear Regulatory Commission on June 25, 2002)(Petitioner representing Intervenor); *Anjone v. Town of Redding*, Superior Court (1986) (vacating town health department orders to an elderly schoolteacher to disconnect her septic system to make way for a corporate development) (Petitioner representing schoolteacher); *Keeney v. Fairfield Resources*, 41 Conn. App. 120, 674 A.2d 1349 (1996)(affirming the right of citizen associations to intervene in environmental enforcement actions under state law)(Petitioner representing neighborhood association).

[2] Petition for Writ of *Certiorari*, App. at 65a.

[3] See, e.g., *Nancy Burton v. Christopher G. Winans*, 91-0-925 (Petitioner filed a grievance complaint in 1989 alleging that Hon. A. William Mottolese, the Respondent herein, engaged in an impermissible *ex parte* communication with opposing counsel in an environmental lawsuit. An independent grievance investigation concluded the *ex parte* communication occurred. In the proceedings below, however, the Respondent "stoutly denied" such *ex parte* session.); *Monsky v.*

Judge Mottolese's order, issued in an environmental lawsuit, disbarring her from the practice of law in Connecticut.

The Respondent's Brief in Opposition gives weight to the notion that these proceedings were initiated and prosecuted as a pretext to shut down the petitioner's public interest work and to retaliate against her judicial whistleblowing. *Venturing outside the record of these proceedings*, the Respondent states in the second paragraph of his Brief in Opposition:

> Ms. Burton **has a long history** of attacking the integrity and impartiality of the Connecticut judiciary . . . [Emphasis added.]

The quoted passage does not appear anywhere in the decision by the Connecticut Supreme Court.

REPLY TO RESPONDENT'S ASSERTION OF "PETITIONER'S MISSTATEMENTS"

The Respondent asserts that some facts in her Statement of the Case are not supported by the record. (Brief in Opposition at 7) Petitioner concedes that when she stated in her Statement of the Case that the Connecticut

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Moraghan, 947 F.Supp. 53 (1996), affirmed on other grounds, 1997 U.S. App. LEXIS 36158 (suit brought by Petitioner to enjoin state judge, Hon. Howard J. Moraghan, from taking his dog to court, where the judge permitted the unleashed golden retriever to bother women inside the courthouse and where appeals to judicial administrative personnel had proved futile); *Nancy Burton v. Statewide Grievance Committee*, 1998 Conn. Super. LEXIS 2729 (1998) (reprimand issued to Petitioner for petitioning the Connecticut Supreme Court pursuant to Connecticut General Statutes § 51-51j to investigate the conduct of three state court judges in a civil action regarding the makeup of a jury pool which included a party's spouse, the court clerk's sister-in-law, the mother of the opposing party's campaign finance secretary, and the nurse assisting the mother of an opposing attorney, among other issues. Reversed and remanded, 60 Conn. App. 698, 760 A.2d 1027 (2000).

Supreme Court affirmed disbarment by a "judge with a longstanding grudge," this was a part of her argument and was not a factual finding by the Connecticut Supreme Court. All statements asserted by the Petitioner are supported by the record in testimony by the Petitioner, plaintiff Joseph Sullivan, the affidavit of plaintiff Irving Nelson, as well as other evidence.[4]

REPLY TO RESPONDENT'S "REASONS FOR DENYING THE WRIT"

The Respondent urges this Court to deny the petition for writ of *certiorari* because the Connecticut Supreme Court decision "does not decide an important federal question in a way that conflicts with a decision of this Court, the United States Court of Appeals, or another state court of last resort." This statement is incorrect.

The Connecticut Supreme Court decision divests the petitioner of her Constitutionally protected liberty and property interests as an attorney—and her good name—without cause and without due process. Therefore, the writ presents compelling cause for review by this Court. See, e.g., *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 670, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985) (" 'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,' due process guarantees must be scrupulously observed. . . . When an attorney's constitutional rights have been violated, we have not hesitated in the past to reverse disciplinary sanctions that were even less severe than a public reprimand.") (Brennan, J., dissenting)

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[4] To the extent that the Respondent objects to the inclusion of facts in her Statement of the Case which appear in the record but which were not relied upon in the Connecticut Supreme Court opinion, the Petitioner did not intend to suggest otherwise and regrets any confusion which may have resulted.

I. THE PETITION DOES NOT CHALLENGE THE TRIAL COURT'S INHERENT AUTHORITY TO *INITIATE* A DISCIPLINARY PROCEEDING

The Respondent miscasts the petition as one challenging the trial court's inherent power to *initiate* attorney disciplinary proceedings. (Brief in Opposition at 12)

To the contrary, the petition expressly *acknowledges* the trial court's inherent power to *initiate* such proceedings; however, it argues that such proceedings must comply with due process and that due process in this case requires compliance with procedural protections embodied in the state rules of practice. (Petition at 18-21). See, e.g., *In re Thalheim*, 853 F.2d 383, 388 (5th Cir. 1988); *Galindo v. State*, 535 S.W.2d 923, 926 (1976); *Emslie v. State Bar of California*, 520 P.2d 991, 999 (1974).

The Respondent further mischaracterizes the petition as identifying Connecticut Practice Book § 2-47 as "the sole *method* under Connecticut law for disbarring attorneys." (Brief in Opposition at 12-13)(Emphasis added.) Section 2-47 is not a "method" for disbarring attorneys: it is a rule of procedure setting forth *minimal due process requirements* which must be accorded an attorney subject to disbarment, regardless of whether the proceedings are initiated pursuant to the court's inherent power.[5]

Without even citing § 2-47, which was first enacted in 1978, the Connecticut Supreme Court relied upon the case of *In re Peck*, 88 Conn. 447, 91 A. 274 (1914), to support the notion that a trial court may dispense with

[5] The Respondent does not dispute petitioner's assertion that all attorney disbarments in Connecticut since the Connecticut Supreme Court reversed the summary disbarment in *State v. Ontra*, 178 Conn. 480, 423 A.2d 134 (1979), have occurred pursuant to § 2-47 —with the Petitioner's case representing the sole exception.

court rules of procedure when disbarring an attorney. However, *In re Peck* does not stand for such a broad proposition; instead, it stands for the narrow proposition that a trial court may on its own initiative and without complaint "set on foot inquiries as to professional conduct and fitness"—a point readily conceded by petitioner.

The Connecticut Supreme Court further relied on the case of *Grievance Committee v. Goldfarb*, 9 Conn. App. 464, 519 A.2d 624, *cert.* denied, 203 Conn. 802, 522 A.2d 292 (1987). However, *Goldfarb* did not involve attorney discipline pursuant to the court's inherent power. *Goldfarb* involved disciplinary proceedings initiated by the Statewide Grievance Committee pursuant to its rules.

While the respondent casts this issue as one involving "pure state law" (Brief in Opposition at 17), such characterization is incorrect. The Petitioner does not ask this Court to *interpret* state law. The Petitioner seeks review of the decision of the Connecticut Supreme Court depriving the Petitioner of her federal due process rights to which she is entitled under state law.

II. THE PETITIONER DID NOT RECEIVE CONSTITUTIONALLY SUFFICIENT NOTICE

The Respondent did not inform the Petitioner that he was considering disbarring her until July 17, 2001, eight months after convening the *sua sponte* inquiry, and six months following the conclusion of the hearing. The notice of charges was set forth in the Respondent's Memorandum of Decision concluding that the Petitioner was guilty of violating various rules of professional conduct.[6] Thus, the Petitioner was not served with a written

[6] Memorandum of Decision, July 17, 2001, at 33. ("A hearing will be held on August 14, 2001 in Courtroom 3C to determine the proper sanction or sanctions to be imposed upon Attorney Nancy Burton for the violations of the Rules of Professional Conduct herein-

notice of the Respondent's charges against her until after the conclusion of the hearing and after she had been pronounced guilty.

In this case, the "absence of fair notice as to the reach of the [disciplinary] procedure and the precise nature of the charges"—as well as the potential consequences of the inquiry—deprived the Petitioner of procedural due process. *In re Ruffalo*, 390 U.S. 554, 552, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968).

Because disbarment proceedings are quasi-criminal in nature, "[t]he charge must be known before the proceedings commence." Id. at 551. As in *Ruffalo*, the Petitioner "had no notice her conduct regarding [the plaintiffs] would be considered a disbarment offense until after the conclusion of testimony." Id. at 550.

" 'Such procedural violation of due process would never pass muster in any normal civil or criminal litigation,' " Id., quoting dissenting Circuit Court Judge Edwards. Id. at 550-51.

Thus, Respondent argues incorrectly that the Petitioner was not entitled to notice of the charges against her until January 4, 2001—the date the Respondent scheduled for Petitioner's testimony.[7] *In re Ruffalo*

above found by the Court. The range of sanctions available to the court include but are not limited to those set forth in P.B. § 2-37, 2-44, G.S. § 51-84, suspension, disbarment and counsel fees."

[7] The Respondent asserts that "Ms. Burton claims that Judge Mottolese 'refused to disclose to her the nature and scope of the proceedings' until December 21, 2000" and that such assertion is "misleading and patently incorrect." Brief in Opposition at 9. First, the Respondent *misquotes* the Petitioner. The Petitioner asserted that the Respondent "*initially*" refused to disclose the nature and scope of the proceedings, referring to the Respondent's comments on December 12, 2000. Second, it is undisputed that the respondent did not inform the Petitioner that he was considering disbarring her until his Memorandum of Law dated July 17, 2001 was issued. See footnote 5 *supra*.

requires notice *prior to the hearing*, which commenced on December 12, 2000.

Moreover, *Ruffalo* requires notice of all the charges being considering by a disciplinary authority. As of January 4, 2001, the Respondent had notified the Petitioner in open court that the Respondent was considering three issues: plaintiffs' authorization, filing pleadings and "divided loyalty." In its July 21, 2001 decision, the Respondent expanded its charges to include many other issues. App. 40a-58a.

As the Respondent catalogues in his Brief in Opposition, at 3-7, the nature and scope of the proceedings continuously evolved.

The Respondent initiated disciplinary proceedings against Petitioner *sua sponte* after the opposing party filed a motion seeking "financial and other sanctions" on October 23, 2000 alleging that the Petitioner was not authorized to represent the plaintiffs in the litigation.

Initially, the Respondent issued an order notifying the parties that it would consider "all motions for sanctions" at a hearing on October 31, 2000.

That hearing was rescheduled to November 27, 2000. The Respondent stated it would "if necessary, adjudicate the status of each plaintiff to ascertain if they [sic] are properly plaintiffs on December 12, 2000."

On November 27, 2000, the Respondent stated in open court that it would address two issues: whether Petitioner "continued to participate in the litigation by filing pleadings and taking action without the consent of her clients" and Petitioner's assertion of gender bias.

On December 12, 2000, the Respondent stated in open court that he had called the hearing to "get on the record

what the facts are, or were with regard to [the plaintiffs'] status as plaintiffs in the case."

It was not until December 21, 2000—following the testimony of seven plaintiffs on December 12, 2000—that the Respondent stated that it was conducting a hearing on its *own* motion—*not the motion of opposing party* attorney—on Petitioner's "alleged unauthorized representation of numerous plaintiffs . . . [and] alleged unauthorized continuation of activity in this lawsuit on behalf of those plaintiffs . . . and what sanctions should ensue from those, if—should the Court find . . . that you have engaged in this type of conduct."

This ever-evolving process violates the principles of due process articulated by this Court in *In re Ruffalo*. Had the petitioner been served with proper notice of all the charges against her *ab initio*, as required by due process, the results would most likely be very different.

III. THE PROCEEDINGS WERE FUNDAMENTALLY UNFAIR

Before commencing its "adjudicatory" hearing on January 4, 2001 to determine whether the Petitioner was authorized to represent the 22 plaintiffs, the Respondent had already concluded that she was not. The Respondent reached his conclusion on December 12, 2000, after listening to *seven* plaintiffs, that she was not.[8]

On December 12, 2000, the Respondent stated that all should be removed as plaintiffs from the case, and he

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[8] The Respondent made numerous comments during the procedings in an apparent attempt to influence the plaintiffs' testimony in a manner prejudicial to the Petitioner, such as his comment to plaintiff Cynthia Ambrosey:

> "Your name appears . . . attached to the summons and complaint, you probably have never—I don't know, have you seen it before?" (December 12, 2000, page 79)

instructed them how to file *pro se* appearances and withdrawals. All present thereupon followed his instruction and unilaterally withdrew from the litigation.

The trial court's determination on December 12, 2000 that the Petitioner was not authorized to institute litigation on the plaintiffs' behalf preceded the testimony of three plaintiffs on December 21 and 22, 2000 to the contrary[9] as well as the Petitioner's own testimony to the contrary commencing on January 4, 2004. In addition, the record includes the letter of plaintiff Irving A. Nelson dated August 14, 2001 stating that he and his wife had fully authorized the Petitioner to represent them in the litigation and that she had their full trust.

In prejudging the issues, the Respondent deprived the Petitioner of the fair hearing required to satisfy basic due process. The Connecticut Supreme Court conclusion to the contrary was clearly contrary to the record.

IV. TO THE EXTENT THAT THE CONNECTICUT SUPREME COURT RELIED UPON PRIOR AND SUBSEQUENT DISCIPLINE, ITS DECISION VIOLATED PETITIONER'S DUE PROCESS RIGHTS

The Connecticut Supreme Court decision recites prior and subsequent discipline as supporting the Petitioner's disbarment as a "reasonable" sanction. App. at 65a. The court's reliance on such discipline deprived the Petitioner of due process.

The Petitioner was disbarred in part based on prior discipline which was subject to further appeal.[10] On

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[9] Joseph Sullivan, Lenore Sullivan and Catherine Finch.

[10] Indeed, as the Petitioner has noted to the Connecticut Supreme Court in a post-decision motion, in one of the instances cited for "prior discipline," the case of *Bartel v. Renard*, the Statewide

August 14, 2001, the Petitioner sought to reopen the proceedings to develop the record on prior discipline. The respondent rejected the request, as follows:

> THE COURT: Well, the fact that it's pending on appeal doesn't matter. . . . Ms. Burton, you'll have adequate opportunity to explain each of them to the respective tribunals before which they are pending, not this Court.

Transcript at pages 79, 82.

The Connecticut Supreme Court compounded the error when it permitted the Respondent to submit the contempt order of U.S. District Judge Alan H. Nevas, issued eight months after the trial court decision which is the subject of the present writ, as a further basis for Petitioner's disbarment.[11]

CONCLUSION

For the reasons stated, the petitioner requests that the petition be granted.

Grievance Committee initiated a complaint against the Petitioner based on a newspaper account of the case and dismissed the complaint after a hearing based on lack of evidence of attorney misconduct.

[11] Judge Nevas' contempt order, in which he imposed a $171,546 punitive sanction upon the Petitioner for instituting two lawsuits under the Connecticut Environmental Protection Act over which he lacked federal jurisdiction and for attending public hearings of and addressing letters to Haddam, Connecticut, public agencies and officials, was the subject of a petition for writ of *certiorari* to the U.S. Supreme Court, *In re Egri*, 03-865, dismissed on February 23, 2004, and is discussed in a petition for writ of *certiorari* now pending before the U.S. Supreme Court, *In re Egri*, 03-1558, as filed on May 17, 2004. The Petitioner has further challenged Judge Nevas' contempt order in a pending declaratory judgment action entitled *Nancy Burton v. Day, Berry & Howard et al.*, 304 CV 515 (RCN)(U.S. District Court, District of Connecticut).

Respectfully submitted,

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